UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding Case No. 99B00060
PATROL & GUARD ENTERPRISES, INC., Respondent.	)	**MARVIN H. MORSE** **Administrative Law Judge**

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY DECISION, AND DENYING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES
(January 6, 2000)

I. BACKGROUND AND PROCEDURAL HISTORY

A. The Complaint (filed August 24, 1999)

On August 24, 1999, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC or Complainant) filed a Complaint on behalf of the United States alleging that Patrol & Guard Enterprises, Inc. (Patrol or Respondent) violated the anti-discrimination prohibitions of 8 U.S.C. § 1324b. According to OSC, an individual, Lisa Thomas (Thomas) effectively filed a charge on January 29, 1999, the investigation of which resulted in filing the Complaint, consisting of three Counts.

Count I: "Attempting to satisfy the employment eligibility verification provisions of 8 U.S.C. § 1324a(b)" with respect to Thomas, Respondent on or about December 22, 1998 unlawfully refused to accept a New York State driver's permit and unrestricted Social Security card, tendered by Thomas in support of her intended "application for a security guard position."[1] Upon learning that Thomas was not a United States citizen, Respondent unlawfully demanded an original "alien card," thereby refusing "to honor documents that reasonably appear genuine on

[1] Title 8 U.S.C. § 1324a(b) prescribes the Immigration and Naturalization Service employment eligibility verification regimen (INS Form I-9) which employers in the United States are obliged to satisfy post-hire.

their face for the purpose or with the intent" to discriminate against Thomas "based on her national origin and/or citizenship status in violation of 8 U.S.C. § 1324b(a)(6) and 28 C.F.R. § 4.200(a)(3)."[2]

Count II: Respondent's selective and intentional practice of demanding INS documentation from only those applicants it perceives to be non-U.S. citizens "constitutes an unfair immigration-related documentary practice" with respect to work-authorized individuals "in violation of 8 U.S.C. § 1324b(a)(6) and 28 C.F.R. § 44.200(a)(3)."

Count III: Respondent's selective and intentional practice of demanding specific documentation from naturalized citizens but not from native-born citizens "constitutes a pattern or practice of citizenship status discrimination with respect to hire of protected individuals in violation of 8 U.S.C. § 1324b(a)(1)(B) and 28 C.F.R. § 44.200(a)(1)(ii)."

B. The Answer (filed September 24, 1999)

The Notice of Hearing transmitting the Complaint to Respondent was received by its attorney on August 30, 1999. The timely Answer filed September 24, 1999 in effect denied each factual and conclusory allegation of the Complaint. In addition, it asserts two affirmative defenses.

First, that Respondent acted in good faith, and made a good faith effort to comply with the anti-discrimination law.

Second, that Respondent is excepted from liability under § 1324b(a)(6) by virtue of § 1324b(a)(2), because its conduct with respect to potential employees, such as Thomas claims to have been, was in compliance with requirements imposed on security guard applicants and their potential employers by New York State statute and regulation. Respondent asserts that it is obliged by law to verify whether a potential security guard is a citizen and, if not, to verify that the individual is in possession of a valid alien registration card.

C. OSC Motion to Strike Respondent's Affirmative Defenses (filed October 13, 1999)

As to the good faith affirmative defense, OSC contends that neither §1324b nor its legislative history contemplates a statutory affirmative defense of "good faith," and that OCAHO has uniformly rejected a "good faith" affirmative defense in § 1324b cases, and, therefore,

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[2]Although Count I refers to "national origin and/or citizenship status," neither party addresses national origin in any subsequent pleading. For that reason, and because the evidentiary submissions on motion practice refer exclusively to citizenship status discrimination and document abuse, I find and conclude that OSC specified national origin solely as a proxy for and to explicate the reference in the last clause of 8 U.S.C. § 1324b(a)(6) to "violation of paragraph (a) [§ 1324b(a)]," and not for the purpose of alleging national origin discrimination.

Respondent's asserted "good faith" affirmative defense is insufficient as a matter of law and should be stricken from the Answer.

As to the second affirmative defense, OSC argues that because on its face the 8 U.S.C. § 1324b(a)(2)(C) exception is not applicable to document abuse (Counts I and II) and, because, with respect to Count III, "the alleged citizenship discrimination (*i.e.*, requiring, in the hiring practice, certificates of naturalization or citizenship from those individuals it believed were not native-born citizens) was not required to comply with any law, regulation, executive order or Federal, State, or local government contract, Respondent's second affirmative defense should be stricken."

Respondent's Answer in Opposition to Complainant's Motion to Strike Affirmative Defenses was filed October 26, 1999, attaching copies of various forms, completion of which is allegedly required pursuant to New York statute and regulation.

OSC's Motion to File Reply was filed November 1, 1999, together with OSC's Reply to Respondent's Answer in Opposition to Complainant's Motion to Strike Affirmative Defenses.

D. Respondent's Motion for Summary Decision (filed October 28, 1999)

Respondent's motion includes an affidavit of Respondent's attorney (the Slepian affidavit), and copies of New York's security guard employment-related forms.

OSC's Response to Respondent's Motion for Summary Decision was filed November 8, 1999, including a Declaration of Lisa Thomas (the Thomas declaration), and copies of numerous Patrol Forms I-9.

II. SUMMARY OF NEW YORK STATE LAW AND REGULATION

Respondent has pleaded the exception[3] to 8 U.S.C. § 1324b and 28 C.F.R. § 44.200(a) in

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[3]Title 8 U.S.C. § 1324b(a)(2)(C) provides, as an exception, that the § 1324b prohibition against discrimination based on national origin or citizenship status shall not apply to "discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government."

Title 28 C.F.R. § 44.200 (b)(1), the Department of Justice regulatory implementation of § 1324b(a)(2)(C), excepts from the coverage of § 44.200(a), explicitly including "Documentation abuses" § 44.200(a)(3):

> (iii) Discrimination because of citizenship which – (A) Is otherwise required in order to comply with law, regulation, or Executive order; or (B) Is required by Federal,

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reliance on the New York statutory and regulatory structure. Respondent contends that New York requires licensed security guard employers to verify citizenship status of potential security guards as a condition of employment.

In light of the scattered nature of the relevant New York statutes and regulations, it is instructive to summarize the statutory and regulatory provisions in this highly regulated industry.

A. New York Statutory Law: General Authority, Article 7 and 7-A of the General Business Law

Article 7 of the General Business Law requires that security guard companies obtain licenses to do business in New York. The New York Secretary of State, Division Of Licensing Services (Secretary), prescribes the application procedure which requires as a precondition to that license a written application containing verification by each person or individual conducting the business that each is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States. See N.Y. Gen. Bus. Law §72 (1) (McKinney 1999).

Article 7-A of the General Business Law (the Security Guard Act) dictates personnel practices for the security guard industry. Each individual who engages in security guard activities is required to register with the Secretary. Specifically, "**[N]o security guard company shall knowingly employ a person as a security guard and no person shall be employed as a security guard or act as a security guard unless**:

a. The security guard company has verified with the department that **such person possesses a valid registration card** [...]; **or,**

b. [The] security guard company has filed with the department [a sworn] **application for a registration card** [and] a certification by the security guard company that it has exercised due diligence to verify as true the information contained in such person's application." N.Y. Gen. Bus. Law § 89(g)(1) (McKinney 1999) (emphasis added).

Subsection 89(g)(2) reiterates the duty of a security guard company to exercise due diligence in verifying that the information provided in all security guard registration card applications it files is true. Subsection 89(g)(7) directs that the employer "maintain for each security guard it employs, and for a period of one year following the retirement, resignation or

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[3](...continued)

State, or local government contract; or (C) Which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

In other words, the Department of Justice implementation of the exception at § 1324b(a)(2)(C) applies on its face to (1) citizenship status discrimination; (2) intimidation or retaliation; and (3) document abuse.

termination of such security guard's employment a copy of the application for a registration card, proof of due diligence to verify the information therein contained, one photograph and training records."

Section 89(h) of the Security Guard Act spells out what is required from **an applicant to qualify for a security guard registration card**. An applicant must file, *inter alia*, a sworn application affirmed by the applicant which in addition to providing a basis for determining the character and fitness, competence and employment history of the applicant, identifies citizenship status, i.e, that the individual is "**a citizen or resident alien of the United States**." N.Y. Gen. Bus. Law § 89(h) (McKinney (1999) (Emphasis added).

B. New York Regulatory Guidelines, Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR)

1. Employer's Responsibilities.

The regulatory implementation of the security guard regimen in New York, at NYCRR tit. 19 § 174.6, obliging employers to exercise due diligence to determine the qualification of an applicant for employment as a security guard, provides at subsection (c)(1) as to a potential guard employee new to the industry, that the employer will have the applicant complete **an employee statement form**, as prescribed by the Secretary. The employer is also required by subsection (c)(6) to have an applicant complete **an application for a security guard registration**, and to review the applicant's criminal history answers to determine eligibility for employment. Currently, one form (**DOS-1324: The Employee Statement and Application for Registration as a Security Guard**) serves the two tasks proscribed by Subsection (c)(1) and (c)(6).

Independently of the production of documents related to completion and verification of information required by Form DOS-1324, employers must perform due diligence by verifying an applicant's identity "by checking identifying documents such as a State-issued driver's license or State-issued I.D. card with a photograph or a U.S. military card." NYCRR tit. 19 § 174.6(c)(4).

To summarize the responsibilities of a New York employer of security guards:

(1) The employer's general obligations are to (a) act with due diligence in verifying identity, background, citizenship status, and criminal history of each applicant; (b) monitor, report, record and attest to all due diligence steps taken; and (c) refuse to hire anyone who does not meet all of the eligibility requirements of a security guard in New York State.

(2) The employer has a specific obligation to file a minimum of two forms: (a) the DOS-

1324[4] mentioned above, which it must verify[5] after completion by an applicant; and (b) the Security Guard Employment Status Notification form.[6]

2. Employee Responsibilities

A potential employee has numerous responsibilities. A person wishing to become a security guard in New York State must "qualify" by completing a structured process involving background checking and verification, photo ID generation, provisional selection for employment, and entry into the New York State security guard registry. A security guard may not commence employment until a completed "application for registration" (involving several forms for a new employee) has been filed.[7] It is this "application" which triggers an applicant's initial entry into the

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[4] A note to employers in the instructions which accompany the DOS-1324 enjoins employers to "determine the qualifications for employment as a security guard. The employer must exercise minimum due diligence steps. The specific steps for employers to follow to recruit guards are set forth in Department regulations 19 NYCRR § 174.6."

The instructions also dictate: **Documentation Required:**

1) Application completed and sworn to or affirmed by the security guard applicant.[...]

8) Any additional documentation requested on the form in response to specific questions.

9) Security Guard Employment Status Notification must be completed by employer if employment commences with filing of application.

[5]The employer attests on the DOS-1324 that "I _____ swear or affirm that I am the representative for the company identified as the employer and that I have verified the statements made by this employee and determined that these statements are true and correct to the best of my ability. **I further attest that** based upon my verification of these statements, **I find that the employee listed hereon is qualified for employment under the provisions of Art. 7 and 7A of the General Business Law**." (Emphasis added).

[6]**Security Guard Employment Status Notification form.** The Status Notification form has a box which employer must check and verify. The box is captioned as follows: "HIRING: Due diligence, as required in DOS regulation, has been exercised in verifying application information." This form, if not filed with application, must be filed within 15 days of employment starting date.

[7] The forms are as follows:

DOS-1206: Application for Guard Registration. This is a short form, which accompanies the fee paid to become a registered guard, and which provides authorization for the Secretary to work with New York State Dept. of Motor Vehicles (DMV) to generate a special photo ID. The photo must be taken by DMV, unless there is one already on record, associated with a New York State (NYS) Driver's License or NYS Non-driver ID.

DOS-1354: Photo ID Card form (mostly instructions). Provides instructions to the DMV office taking the photo of the potential security guard. It states that before DMV can take

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security guard registry and subsequent generation of the required State-issued security guard registration card.

The Secretary issues all forms to be completed in the employment-related processing of security guards.

C. Security Guard Registration/Licensing Scenario Outline

The detailed statutory provisions, implementing instructions, and prescribed forms evidence New York's comprehensive regulatory participation in the hiring practices concerning individuals seeking employment as security guards in New York State. The dictates of the structure suggest the following logical sequences for the completion of security guard "qualifying" and "hiring" processes respectively. The sequences outlined below reflect in the aggregate the New York statutes, regulations, instructions, and forms and assume the individual seeking employment is not already registered/licensed as a security guard in New York. Because the Thomas declaration does not disclose prior registration/license, she is understood to be an individual not previously registered/licensed.

1. New Employee Qualifying Herself/Himself

(1) Acquire certification of completion of the 8-hour minimum of pre-assignment training.
(2) File Application for Photo ID Card:
  (a) Without New York State (NYS)-issued Driver's License or ID:
    i. Assemble proof of birth (foreign birth certificates not acceptable).
    ii. Assemble 6 points of identification, as per list (original documents).
    iii. Go to NYS DMV with proofs of birth and ID, and get photo taken.
    iv. File photo ID application with Secretary, with $36.00 fee.
  (b) With NYS Driver's License or ID:
    i. File photo ID application with 9 digit DMV # with Secretary.

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[7](...continued)
the photo, applicant must provide proof, in the form of original documents, of date of birth and 6 "points of identification." On the back of the DOS-1354 are listed acceptable identifying documents and point values which have been assigned to each [Social Security card = 2 points; non-NY Driver's license = 3 points].

DOS-1324: The Employee Statement and Application for Registration as a Security Guard form. The DOS-1324 is a long, comprehensive form which serves the functions of providing data for entry into the registry as well as being a basis for background information checking and verification on the part of both the potential security guard and the potential employer. The form contains sections very similar to standard employment applications as well - e.g., employment history. Question 6 of this form asks: *Are you a citizen of the United States or a legal resident of the United States in possession of a valid alien registration card? <u>If NO, attach explanation</u>.*

(3) Be "qualified" by a potential employer who exercises due diligence.

(4) File a registration application for employment through a potential employer, including, inter alia:

(a) Place of birth
(b) Attestation re: background data (inter alia, citizenship, criminal history)
(c) Employment history;
(d) Fingerprints attached;
(e) Photo attached.

(5) Receive temporary ID from employer.

(6) Commence employment.

(7) Receive "permanent" ID from Secretary.

2. Employer's Hiring Process of Potential Guard New to Industry

a. Employer's Option A: Three stage scenario

Stage I.

(1) Make security guard position available.

(2) Stage I organizational interview with potential candidate:
Oral verification of security guard license eligibility, with inquiries re:
Age (over 18);
Proof of birth/birthplace; Six "points" of identity documentation;
Proof of U.S. citizenship or LPR status; Criminal history;
Prior history as a security guard; five years of prior employment;
Completion of 8-hour pre-assignment training course.

(3) Make phone call to registry; record transaction # on registration application.

(4) Make provisional decision to hire.

(5) Inquire regarding photo requirement. Does candidate have a NYS Driver's License, or Non-Driver ID card? If NOT, send candidate to DMV to take care of photo requirement with NYS DMV (Must be done prior to completing registration application).

Stage II.

(6) Work with potential employee to acquire certificate of completion of training.

(7) Work with potential employee to insure all fees, forms, photos, and fingerprints necessary to entry in the security guard registry and generation of a New York security guard registration card are completed, assembled and mailed to the Secretary.

Stage III.

(8) Orientation and paperwork interview with new employee:
Generate temporary ID card from employee supplied photo;
Fill out I-9; Fill out W-4 and other tax, benefits and misc. forms;

Provide assignment of hours and location.
(9) Mail Security Guard Employment Status Notification form, with $25, to report HIRING decision within 15 days.

b. Employer Option B: One stage scenario

(1) Make security guard position available.
(2) Potential guard, with NYS Driver's license, photos, and certificate of training in hand, is interviewed, with same inquiries as above regarding identity and background.
(3) Make phone call to registry; record transaction number on application for registration.
(4) Make provisional decision to hire.
(5) Have new employee complete the rest of the registration form, providing all the identifying documents suggested by both the form and the due diligence regulation.
(6) Continue on with having employee complete all the other forms, including I-9.
(7) Have employee write appropriate checks for fees.
(8) Take employee fingerprints.
(9) Provide assignment of hours and location.
(10) Mail Security Guard Employment Status Notification form, to report HIRING decision, along with Employee Statement and Application for Registration (and required attachments) to the Secretary.

III. ANALYSIS AND DISCUSSION OF MOTION FOR SUMMARY DECISION

A. Summary Decision Generally

Title 28 C.F.R. § 68.38(c)[8] authorizes the Administrative Law Judge (ALJ) to dispose of cases, as appropriate, upon motions for summary decision. Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise ... show that there is no **genuine issue as to any material fact** and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1997) (emphasis added). OCAHO jurisprudence is generally consistent with Article III case law;[9] both define a fact as material if it might affect the outcome of the case. See

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[8] Rules of Practice And Procedure For Administrative Hearings Before Administrative Law Judges In Cases Involving Allegations Of Unlawful Employment Of Aliens And Unfair Immigration-Related Employment Practices, 28 C.F.R. Part 68 (1999) (Rules).

[9] The Federal Rules of Civil Procedure are available to the ALJ "as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act,

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e.g., *United States v. Morgan's Mexican & Lebanese Foods, Inc.*, 8 OCAHO 1013, at 3[10] (1998), *available in* 1998 WL 1085946 at *3 (O.C.A.H.O.) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)).

The law of the United States Court of Appeals for the Second Circuit, the circuit in which this case arises, is to the same effect. *Turner v. General Motors Acceptance Corp.*, 180 F.3d 451, 453 (2d Cir. 1999) (summary judgment is appropriate "if the pleadings and evidentiary submissions demonstrate the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."); *Bogan v. Hodgkins*, 166 F.3d 509, 511 (2d Cir. 1999) ("Summary judgment is appropriate '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.' ") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In determining whether a genuine factual issue exists, courts must resolve all ambiguities and draw all inferences in favor of the non-moving party. *Bogan*, at 511. Notwithstanding this presumption favoring the non-movant, the Second Circuit has held that "courts need not be reluctant to grant summary judgment in appropriate cases." *CL-Alexanders Laing & Cruickshank v. Goldfield*, 739 F. Supp. 158, 161 (S.D.N.Y. 1990).

The pertinent OCAHO Rule, 28 C.F.R. § 68.38(c), assigns the relative burdens of production on a motion for summary decision. The moving party has the initial burden of identifying those portions of the complaint "that it believes demonstrates the absence of genuine issues of material fact." *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 932 (1994), *available in* 1994 WL 721954, at *6 (O.C.A.H.O.) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1985)). "The moving party satisfies its burden by showing that there is an absence of evidence" to support the non-moving party's case. *Id.* The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. That showing may be made by means of affidavits, or by depositions, answers to interrogatories, or admissions on file. *Celotex*, 477 U.S. at 324.

The function of summary decision is to avoid an unnecessary evidentiary hearing where there is no genuine issue of material fact, as shown by pleadings, affidavits, discovery, and

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[9](...continued)
or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1.

[10]Citations to OCAHO precedent refer to volume and consecutive reprint number assigned to decisions and orders. Pinpoint citations to precedents in Volumes 1 and 2, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES, and Volumes 3 through 7, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS, UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES AND CIVIL PENALTY DOCUMENT FRAUD LAW OF THE UNITED STATES are to specific pages, seriatim of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume VII are to pages within the original issuances.

judicially-noticed matters. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). However, "[w]here a genuine question of material fact is raised, the Administrative Law Judge shall, and in any other case may, set the case for an evidentiary hearing." 28 C.F.R. § 68.38(e); *United States v. Valenca Bar & Liquors*, 7 OCAHO 995, at 1104 (1998), *available in* 1998 WL 746012, at *1 (O.C.A.H.O.). As summarized in *Valenca Bar & Liquors*, on assessing the existence of genuine issues of material fact, all reasonable inferences should be drawn in favor of the non-moving party and if a genuine issue of material fact is gleaned from this analysis, summary decision is not appropriate. *Id*.

To withstand the motion for summary decision, the non-moving party is obliged to produce some evidence, direct or inferential, respecting every element essential to that party's case on which that party has the burden of proof at trial. *Celotex v. Catrett*, 477 U.S.at 322. As recently held in *Ipina v. Michigan Jobs Commission*, 8 OCAHO 1036, at 7 (1999), ____ WL _____ (O.C.A.H.O.):

> While all reasonable inferences are to be drawn in favor of the nonmoving party, summary judgment will nevertheless issue where there are no specific facts shown which raise a contested material factual issue. Adickes v. S.H.Kress & Co., 398 U.S. 144, 157 (1970). Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, summary judgment is appropriate. Agristor Financial Corp. v. Van Sickle, 967 F2d 233, 236 (6th Cir. 1992).

B. Motion for Summary Decision is Technically Sufficient

I am unpersuaded by Complainant's argument that the motion should fail for technical inadequacy. Arguing that Patrol relies in substantial part on the Slepian affidavit, Complainant contends that the Second Circuit rejects summary judgment motions supported only by affidavits of movants' counsel. Complainant's cases are readily distinguishable.

Two of the Complainant's cases, *Wyler v. United States*, 725 F.2d 156 (2d Cir. 1983), and *CL-Alexanders Laing & Cruickshank v. Goldfield*, 739 F. Supp. 158 (S.D.N.Y. 1990), discuss the insufficiency of affidavits submitted by non-moving parties' attorneys in response to summary judgment motions, not affidavits of movants' attorneys. Moreover, both the *Wyler* and *Goldfeld* courts highlight the essential difference between the posture of the movant and non-movant, where the latter has the burden of persuasion that there is a genuine issue of material fact. *Wyle*r, 725 F.2d at 160; *Goldfeld*, 739 F. Supp. at 162. Both courts discount the affidavits of the non-movants because the affiants' assertions did not rise to the level of sufficient factual rejoinder to the moving parties' assertions to warrant consideration. *Id.*

The other holdings on which Complainant relies are case and fact-specific, focused on situations quite distinct from the present case. In *Beyah v. Coughlin*, 789 F.2d 986, 989-90 (2d

Cir. 1986) a prison counsel's affidavit asserted, without "personal knowledge," that there were no pork products in the bath soap of prisoners, when allegation of pork products was the substance of complaint. In *Seller v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988), the affidavit of movant's counsel asserted particular statements, not based on his personal knowledge, about the non-moving party (*e.g.*, that he had failed to exhaust union grievance procedures). In contrast, Patrol's counsel makes no assertions about the facts in the Thomas declaration, nor offers commentary about the Complainant, OSC.

Complainant also relies on *Gieseler v. Smith*,1987 WL 27705 (S.D.N.Y. 1987), a civil rights action alleging unlawful arrest, which found counsel's affidavit made no affirmative showing that the affiant was competent to testify as required by Fed. R. Civ. P. 56(e). Here, I am satisfied the Slepian affidavit recites a sufficient competency to narrate the compliance obligation of security guard companies under New York law. Furthermore, in contrast to Fed. R. Civ. P. 56(e), OCAHO Rule 68.38 does not require the affiant's assertions to be based on personal knowledge.

Title 28 C.F.R. § 68.38 governing motions for summary decision in § 1324b cases, does not require supporting affidavits. Even so, counsel's affidavit conveniently outlines the regimen which New York imposes on employment procedures in the security guard industry, providing an overview of the critical path to be followed by employers and applicants for employment as security guards. That path identifies the expected compliance behavior of the employer in order to maintain its New York license. As counsel for Patrol, Slepian is *prima facie* competent to outline his client's compliance obligations while assisting the reader by threading through the public documents, public law and regulation pursuant to which Patrol is obliged to operate.

For the foregoing reasons, I cannot agree with OSC that the affidavit should be rejected. The Slepian affidavit is a useful aid to avoiding a torturous excursion through the New York regulatory maze. The result reached here would be the same absent the affidavit.

C. The Counts of the Complaint

The discussion below addresses whether, as to each Count, there is any genuine issue as to any material fact, and whether Patrol is entitled to summary decision. 28 C.F.R. § 68.38(c).

1. Count I: Allegation of Single Instance of Document Abuse.[11]

Complainant alleges document abuse in the employment application interaction between Thomas and Patrol. Complainant asserts that Thomas entered Patrol's place of business and requested an application, which was refused her after several questions were asked and

[11]In this Order, "document abuse" and "overdocumentation" are used interchangably to refer to conduct within the scope of 8 U.S.C. § 1324b(a)(6).

answered.[12] This single exchange is the entire basis for the allegation that Respondent attempted "to satisfy the employment eligibility verification provisions of 8 U.S.C. § 1324a(b)" in an unlawful manner.

With respect to Count I, Respondent acknowledges that there are questions of fact, *e.g.*, "[w]hether Ms. Thomas did or did not appear at Patrol and Guard as alleged." Motion for Summary Decision, at 7. The judicial inquiry, however, is whether there are genuine issues of **material** fact which could affect the outcome of the case.

The Complaint on its face, supported by the Thomas declaration, makes clear that the interaction had not reached the stage where document abuse within the scope of § 1324b(a)(6) could have occurred. Title 8 § 1324b(a)(6) makes an employer's request for more or different documents than are required by 8 § 1324a(b) an unfair immigration-related employment practice only if the request is **"for purposes of satisfying the requirements of section 1324a(b)"** of Title 8, *i.e.*, complying with the employment eligibility verification regimen mandated by §1324a(b).

Assuming the truth of the Count I allegations, Thomas only reached the point of initial contact, *i.e.*, a threshold inquiry about a job. She was denied the opportunity of taking the step prerequisite to a decision to hire -- the New York State (NYS)-mandated registration precondition to effecting a job application. As a consequence of State law and regulation, a hiring decision was premature at that time.

Respondent asserts, and Complainant does not refute, that New York imposes a regimen of due diligence steps on all security guard companies with respect to their hiring procedures. Specifically, Respondent is required to verify identity with six points of identification, to insure that a photo registration card is generated in a specific way for every potential guard, and to verify that the applicant is a citizen or a "legal resident of the United States in possession of a valid alien registration card." Form DOS-1324, Background Data Section, Question 6. These requirements must be met before the person is considered "employable" by the company, which faces sanctions if it hires without first meeting due diligence requirements.

Assuming as true that Thomas asked for an application, the factual questions arise as to (1) whether Thomas asked for an employment application, or for the New York State-mandated application for registration as a security guard; and (2) whether Respondent utilizes a separate employment application which it provides to candidates at some point before making a hiring decision, and if so, whether it deliberately denied this application to Thomas in addition to the NYS-mandated one.

These are factual questions whose answers may be disputed by the parties; however, their answers are not material to the outcome of Count I. Whichever application Ms. Thomas thought

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[12] Respondent allegedly initially asked for identification documents, and then asked for an original copy of proof of her legal resident alien status.

she was asking for, New York law unambiguously requires that the employer must preliminarily execute, including verification, the State prescribed registration application.

New York State law establishes that security guard employment eligibility requirements are to be met **before** a hiring decision is made. In sharp contrast, § 1324a(b), § 1324b(a), implementing regulations, and OCAHO caselaw establish that the employment eligibility verification form (INS Form I-9) is to be filled out only **after** a hiring decision is made. Complainant does not allege that Respondent reversed the order of satisfying its respective verification duties, nothing submitted on the motion practice indicates such a reversal, and OSC does not claim that Patrol is out of compliance with New York law.

It is undisputed that Respondent had at most the one exchange with Thomas, which included the one question regarding her proof of identity, and a second set of questions regarding original proof of citizenship status. The Thomas answers, according to her declaration, failed to establish her eligibility for registration under New York State law. If Patrol rejected Thomas, it did so only at the conclusion of that one exchange. As she left without any application, I conclude that the prerequisite first step of complying with New York law was not completed by Respondent. The rejection of Thomas took place pursuant to Respondent's first priority of satisfying State requirements for security guard staffing. Title 8 U.S.C. § 1324b(a)(6) makes unlawful only those employer requests for more or different documents "for purposes of" § 1324a(b). It, therefore, does not reach employer inquiries of prospective employees mandated by State law as a precondition to security guard employment by a security guard employer.

This disposition of Count I does not reach nor resolve the affirmative defense claimed by Patrol, but opposed by OSC, that by virtue of 8 U.S.C. § 1324b(a)(2)(C) the New York regulatory scheme trumps § 1324b(a)(6). By holding that compliance with State conditions of employment eligibility renders Patrol blameless under § 1324b(a)(6) for inquiring into Thomas's citizenship status, this ruling simply recognizes that there can be no security guard employment in New York State without first establishing that the prospective guard is a citizen or permanent resident alien. The inquiry to establish that status does not intrude into the symmetry between § 1324a(b) and § 1324b(a)(6) because the putative relationship between the parties is preliminary to an employment which only then implicates a Form I-9 compliance obligation. The conduct by Patrol may starkly reflect the exception of § 1324b(a)(2)(C) as to citizenship status discrimination according to its terms, but because by operation of New York law the § 1324a(b) Form I-9 stage has not been reached, there is no violation within the scope of the § 1324b(a)(6) over-documentation prohibition as to Thomas.

No reasonable person could infer from these facts that Thomas was asked for more or different documents than those required by the Form I-9, because Form I-9 compliance was not implicated. Form I-9 compliance is required only after a hiring decision is made. The strict requirements New York law imposes on security guard companies imply that at the stage where Ms. Thomas was told she must present her original "green card," and then was refused an application, no hiring decision could have been made.

I am obliged in ruling on summary decision to "draw all inferences in favor of the non-moving party." *Bogan*, 166 F.3d at 511. Accordingly, I conclude that Thomas was denied an opportunity to fill out an application. However, I also conclude that any application she would have obtained as the result of her inquiry at Patrol would have necessitated going through the New York State procedures as a condition precedent to the employer's hiring procedures.

The high degree of regulatory control by the Secretary as demonstrated by the reporting and monitoring regimen concerning eligibility for and employment of security guards establishes a relationship between the employer and the state, the result of which relegates the employer to a role as an agent of the state. Until that role is fulfilled with respect to the registration/licensing of the potential security guard, the employer's hiring processes do not take place. Absent any showing that the precondition to employment eligibility was satisfied, with respect to Thomas, Patrol's hiring processes were never invoked, and therefore could not have implicated § 1324b(a)(6).

By its language, OSC concedes that Count I turns on Patrol's over-reaching in context of compliance with § 1324a(b). Where there is no basis for an inference that §1324a(b) obligations are implicated, § 1324b(a)(6) is not in play. It follows that I am unable to discern a genuine dispute over material fact with respect to Count I, as to which I grant the Motion for Summary Decision.

2. Count III: Allegation of Pattern or Practice of Citizenship Status Discrimination

Complainant alleges that in violation of 8 U.S.C. § 1324(a)(1)(B) and 28 C.F.R. § 44.200(a)(1)(ii) Respondent discriminates against United States citizens whom it perceives to be foreign-born by imposing a burdensome condition of employment upon them (*i.e.*, requiring presentation of Certificates of Naturalization) which it does not impose on those citizens it perceives to be native born.

The controlling provisions are set out in the margin.[13]

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[13] **8 U.S.C. § 1324(a)(1)(B).** It is an unfair immigration-related employment practice for a person or other entity to discriminate against [a protected individual (as defined in paragraph (3)-- such definition to include U.S. citizens or nationals, as well as lawful permanent residents who applied for naturalization within six months after becoming eligible to do so)] with respect to the hiring [...] of the individual for employment [...] (B) [...] because of such individual's citizenship status.

28 C.F.R. § 44.200(a)(1). (1) General. It is unfair immigration-related employment practice for a person or other entity to knowingly and intentionally discriminate or to engage in a pattern or practice of knowing and intentional discrimination against any individual (other than an unauthorized alien) with respect to the hiring [...] of the individual for employment [...] (ii) In the (continued...)

Disparate treatment is the core of § 1324b discrimination liability. For a claim to constitute discrimination "[t]he employer [must] ... treat some people less favorably than others" because of a protected characteristic. *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). "Where citizenship status is the forbidden criterion, there must ... be some claim ... that the individual is being treated less favorably than others because of his citizenship status." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 901-2 (1996), *available in* 1996 WL 780148, at *8 (O.C.A.H.O.).

It is the complainant's burden to prove citizenship status discrimination. *Winkler v. Timlin*, 6 OCAHO 912, at 1058 (1997), *available in* 1997 WL 148820, at *7 (O.C.A.H.O.); *Toussaint v. Tekwood*, 6 OCAHO 892, at 801 (1996), *available in* 1996 WL 670179, at *12 (O.C.A.H.O.); *United States v. Mesa Airlines*, 1 OCAHO 74, at 500 (1989), *available in* 1989 WL 433896, at 32 (O.C.A.H.O.), appeal dismissed, *Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991). To state a *prima facie* case of citizenship discrimination, "a complaint must contain either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory." *Lee v. Airtouch Communications*, 6 OCAHO 901, at 901 (1996), *available in* 1996 WL 780148, at *8 (citing *L.R.L. Properties v. Portage Metro. Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995)). In assessing whether a *prima facie* case has been pleaded, well-stated allegations of fact are taken as true. Legal conclusions and unsupported inferences, however, "obtain no deference." *Cholerton v. Robert M. Hadley Co.*, 7 OCAHO 934, at 233 (1997), *available in* 1997 WL 1051435, at *7 (O.C.A.H.O.).

As stated in *Winkler v. Timlin*,

> A *prima facie* case of citizenship status discrimination, adapted from the framework the Supreme Court developed in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 492 (1973) and elaborated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), is established where an applicant for employment shows that:
>
> (1) he is a member of a protected class;
>
> (2) the employer had an open position for which he applied;
>
> (3) he was qualified for the position; and
>
> (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Lee v. Airtouch, 6 OCAHO 901, at 11.
Winkler v. Timlin, 6 OCAHO 912, at 1059 (1997), *available in* 1997 WL 148820 at *7-8 (O.C.A.H.O.).

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[13](...continued)
case of a protected individual, as defined in § 44.101(c), because of such individual's citizenship status.

The Second Circuit adopts the McDonnell Douglas/Burdine paradigm for proving a *prima facie* discrimination case. See *Norville v. Staten Island Univ. Hospital*, 196 F.3d 89, 96 (2d Cir. 1999) ("To establish a prima facie case of age discrimination, a plaintiff must show: (1) membership in a protected age group; (2) qualification for the position; (3) an adverse employment decision; and (4) circumstances giving rise to an inference of discrimination") (citing *Austin v. Ford Models, Inc.*, 149 F.3d 148, 152 (2d Cir. 1998)). The burden of proof that must be met to "survive a summary judgment motion at the *prima facie* stage" is minimal. *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (quoting *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988)).

OSC cannot meet this minimal burden of proof. A reasonable fact finder could find in OSC's favor only if Complainant's pleadings alleged each element of a *prima facie* case by showing: (1) there were jobs available with Patrol; (2) applicants who were members of a protected "citizenship" class applied for the jobs; (3) these applicants were qualified for the jobs; (4) applicants were not hired because of their citizenship status, and the jobs remained open for other applicants to fill. OSC fails to allege two of these elements: first, it does not allege there were specific qualified applicants (*e.g.*, at a minimum, individuals eligible under New York law to be security guards); and second, OSC does not allege qualified applicants suffered specific adverse employment decisions, *i.e.*, were not hired. Patrol argues there is no factual basis for the Count III allegations of citizenship status discrimination, and OSC fails to meet its obligation of providing with specificity material facts in dispute with respect to Count III.

Maximizing opportunities to amend discrimination complaints is generally encouraged. See *Fuller v. City of Oakland, Ca.*, 47 F.3d 1522, 1535 (9th Cir. 1995); *Perugini v. Safeway Stores, Inc.*, 935 F.2d 1083, 1085 (9th Cir. 1995). Because, however, OSC relies exclusively as the gravamen of the discrimination claim on vague conclusory statements about what must occur at Respondent's place of business, the consequential lack of any discernible meritorious § 1324b claim forecasts that amendment of Count III would be futile.

Even if OSC could establish a *prima facie* case of citizenship status discrimination, Patrol has articulated a legitimate, nondiscriminatory reason for actions alleged to be discriminatory, namely that its actions were taken with the well-intended purpose of complying with New York law and regulation in order to maintain its business license as an employer of security guards. OSC would be unable to show this was pretextual. As discussed *infra* at IV(B), New York law is within the exception at 8 U.S.C. § 1324b(a)(2)(C). Count III allegations of citizenship status discrimination fit exactly into the exception. Patrol's pleadings argue persuasively, as to Count III, that there are no genuine issues of material fact in dispute with regard to security guard regulatory compliance in New York.

As discussed above, the deficiencies of Count III cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact to warrant a confrontational evidentiary hearing, with respect to Count III.

I conclude that the pleadings make clear that Complainant will be unable to establish a *prima facie* case of citizenship status discrimination, "let alone carry his ultimate burden of proof...." *Williamson v. Autorama,* 1 OCAHO 174, at 1176 (1990), *available in* 1990 WL 515872, at *6 (O.C.A.H.O.) quoting *Scarselli v. Reserve Management Corp.,* 33 Empl. Prac. Dec. P33981 (S.D.N.Y. 1983).

While the Motion is one for summary judgment, it is appropriate to treat it with respect to Count III as failure to state a claim. 28 C.F.R. § 68.10(b). Count III is, therefore, dismissed for failure to state a claim cognizable under 8 U.S.C. § 1324b.

3. Count II. Allegation of Pattern or Practice of Unfair Documentary Practices

Complainant alleges that Respondent's standard operating procedure in the hiring process is to selectively and purposefully demand [more or different] documentation from unnamed applicants whom it perceives to be non-U.S. citizens, in violation of 8 U.S.C. § 1324b(a)(1), 8 U.S.C. §1324b(a)(6), and 28 C.F.R. § 44.200(a)(3). The controlling provisions are set out in the margin.[14]

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[14] **8 U.S.C. § 1324(b)(a)(1).** It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual with respect to the hiring [...] of the individual for employment [...] (A) because of such individual's national origin, or (B) in the case of a protected individual [...] because of such individual's citizenship status. (2) Exceptions. Paragraph (1) shall not apply to– (A) a person or other entity that employs three or fewer employees, [...] or **(C)** discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

8 U.S.C. § 1324(b)(a)(6). Treatment of certain documentary practices as employment practices. A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

28 C.F.R. § 44.200(a)(3) Documentation abuses. A person's or other entity's request, for purposes of satisfying the requirements of 8 U.S.C. § 1324a(b), for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

28 C.F.R. § 44.200(b) Exceptions. (1) Paragraph (a) of this section shall not apply to-- (i) A person or other entity that employs three or fewer employees; (ii) Discrimination

(continued...)

Complainant implies a documentary abuse pattern or practice of requiring more or different documentation from unnamed citizen applicants whom Patrol believes to be naturalized citizens. In order to prove a pattern or practice of § 1324b document abuse, OSC must establish that Patrol, more than once, requested more or different documents than are required in implementation of its § 1324a verification obligations. See *United States v. Zabala Vineyards*, 6 OCAHO 830, at 74 (1995), *available in* 1995 WL 848947, at *2 (O.C.A.H.O.).

On motion practice, OSC provided a selection of Patrol Forms I-9 to evidence varying documentary submissions by employees in Patrol's employment eligibility verification compliance. Suggesting that employees were treated differentially depending on citizenship status, OSC's submission invites the question whether in performing its I-9 obligations Patrol went further than New York requires, subjecting potential new hires to unfair documentary abuse practices in violation of §1324b(a)(6). Although OSC filings of Patrol's Forms I-9 in support of Count IIII arguments are not persuasive with respect to that Count, they may be of probative value with respect to over-documentation allegations.

Count II, broadly read to include documentary abuse practices with unfavorable consequences to as yet unidentified non-citizens and naturalized citizens, prompts two further legal inquiries. Acknowledging that more or different documents are examined in the process of complying with § 1324a(b), Patrol defends its I-9 practices, arguing that the presentation of these "extra" documents is an unavoidable, natural and innocent consequence of fulfilling its obligations to the State. Close examination of New York regulatory practice in the context of multiple compliance scenarios, however, may establish that the employer has opportunity within the rigors of the New York regime to intentionally engage in § 1324b documentary abuse practices, notwithstanding New York's requirements.

As discussed at Count I, the Thomas job inquiry never reached the stage of consideration for employment. In contrast, it is reasonable to infer from the pleadings that OSC can show that document abuse was implicated in the cases of other security guard eligibles whose applications had gone beyond initial inquiry to the § 1324a(b) compliance stage. To establish liability for §1324b document abuse, "it is not necessary that the employees who are 'discriminated' against experience injury. Rather, there is a violation if an employer requests more or different documents than are required or produced by the applicant, whether or not the applicant is ultimately hired." *Zabala Vineyards*, 6 OCAHO, at 74.

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[14](...continued)
because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under 42 U.S.C. §2000e-2; or (iii) **Discrimination because of citizenship** which-- (A) Is otherwise required in order to comply with law, regulation, or Executive order; or (B) Is required by Federal, State, or local government contract; or (C) Which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

Because the pleadings suggest that OSC may be able to establish pattern or practice violations of § 1324b(a)(6), I am unable to conclude that there is no genuine issue of material fact as to such violations. See, *e.g.*, *Mesa Airlines*, 1 OCAHO 74, at 508, 1989 WL 433896, at 32, quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977): at "the initial, 'liability' stage of a [§ 1324b] pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a *prima facie* case that such a policy existed." Count II survives the Motion for Summary Decision because it alleges pattern or practice violations, and Patrol has failed to argue persuasively that there are no material issues in dispute regarding the existence of such pattern or practice. "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Pearlstein v. Staten Island University Hospital*, 886 F. Supp. 260, 265 (E.D.N.Y. 1995) (quoting *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994)).

Concerning § 1324b(a)(6) pattern or practice cases, however, the caution expressed in *Zabala Vineyards*, 6 OCAHO, at 89, is instructive:

> OSC should be prepared in future cases, at a minimum well before hearing if not at the time of filing its complaint, to identify, with particularity the number and identity of all individuals on whose behalf a pattern or practice complaint is premised.

Surviving Patrol's Motion for Summary decision, Count II makes inescapable the confrontation between the exception of § 1324b(a)(3) and the liability of § 1324b(a)(6) discussed in the pleadings of both parties. Even assuming the availability of the exception, Count II implicitly questions whether Patrol's implementation of the New York regimen provides a pretextual assertion of State requirements as an excuse for document abuse. Accordingly, the Motion for Summary Decision is overruled as to Count II.

IV. THE MOTION TO STRIKE AFFIRMATIVE DEFENSES IS DENIED

Discussion of the Motion to Strike Affirmative Defenses addresses only Count II, since that Count alone survives.

Because the Rules are silent as to motions to strike, it is appropriate to apply Rule 12(f) of the Federal Rules of Civil Procedure as a guideline in considering motions to strike affirmative defenses. *United States v. Irani*, 6 OCAHO 860, at 382 (1996), *available in* 1996 WL 430387, at *2 (O.C.A.H.O.); *United States v. Chi Ling, Inc.*, 5 OCAHO 723, at 12 (1995), *available in* 1995 WL 714427, at *3 (O.C.A.H.O.); *United States v. Makilan*, 4 OCAHO 610, at 205 (1994), *available in* 1994 WL 269385, at *2 (O.C.A.H.O.). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense." Fed. R. Civ. P. 12(f).

It is well settled that motions to strike affirmative defenses are disfavored in the law, and should be granted only when the asserted affirmative defenses lack any legal or factual grounds. See *United States v. Borrelli and Sons, Inc.*, 8 OCAHO 1027, at 4 (1999), *available in* 1999 WL 608819, at *3 (O.C.A.H.O.); *Irani*, 6 OCAHO 860 at 382, 1996 WL 430387 at *2; *United States v. Chavez-Ramirez*, 5 OCAHO 774, at 410 (1995), *available in* 1995 WL 545442, at *2 (O.C.A.H.O.); *Makilan*, 4 OCAHO 610, at 205, 1994 WL 269385 at *2; *United States v. Task Force Security, Inc.*, 3 OCAHO 563 at 1612 (1993), *available in* 1993 WL 502297, at *3 (O.C.A.H.O.). For example, an affirmative defense will be struck only if there is no *prima facie* viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. See *Irani*, 6 OCAHO 860, at 382, 1996 WL 430387 at *2; *Chi Ling*, 5 OCAHO 723, at 12, 1995 WL 714427, at *3; *Makilan*, 4 OCAHO 610, at 205, 1994 WL 269385 at *2; *Task Force*, 3 OCAHO 563, at 1612, 1993 WL 502297, at *3.

For an apt decision on affirmative defenses in the district in which this case arises, see *Resolution Trust Corp. v. Gregor*, 1995 WL 931093 (E.D.N.Y. 1995).

A. Good Faith Defense

Arguing that Patrol's good faith claim is legally insufficient under OCAHO caselaw, OSC relies on precedents which predate the 1996 amendment to § 1324b(a)(6). Whether or not the New York regime trumps § 1324b(a)(6) as a matter of law, it is undisputed that putative compliance with that regime invites citizenship status inquiry without reference to employment eligibility verification. In this regard, OSC several years ago characterized "the test it argues a complainant must satisfy" under the revised statute [§ 1324b(a)(6) as amended in 1996] to prove document abuse:

> a complainant must now prove that the employer either: (1) requested more or different documents than are required for employment eligibility verification purposes; **or** (2) rejected documents that on their face reasonably appeared genuine; **and** (3) that the employer acted for the purpose or with the intent of discriminating on the basis of national origin or citizenship status.

Quoted in *Tadesse v. United States Postal Service*, 7 OCAHO 979, at 940 (1997), *available in* 1997 WL 1051473, at *3 (O.C.A.H.O.). OSC's remarks as *amicus curiae* in *Tadesse* can leave no doubt that it understands liability for document abuse to depend on inquiry pursuant to § 1324a(b).

Tadesse, a case of first impression in OCAHO jurisprudence to address "'intent' for the purpose of establishing a violation of 8 U.S.C. § 1324b(a)(6), as amended effective September 30, 1996," rejected the employer's effort to rely on the absence of evil intent as a complete bar to § 1234b(a)(6) liability under the new intent standard. *Id.* at 940-941. Leaving the door open to rebut the employer's assertion of innocent error, *Tadesse* implicitly countenanced an inquiry into the good faith of the employer, cautioning that "it is not a final adjudication of the meaning of

'purpose' or 'intent' as applied to the *Tadesse* claim." *Id*. at 945.

Patrol's "good faith" defense, as amplified by its rejoinder to OSC's Motion to Strike puts at issue the intent standard of § 1324b(a)(6) as last amended in 1996, sufficient to overcome OSC's motion. However, consistent with *Tadesse*'s emphasis on caveats drawn from legislative history of the 1996 amendment, Patrol may need to carry the burden of "demonstrat[ing] constructive knowledge or reasonable suspicion that an employee or applicant is illegal." *Tadesse, at* 945. As discussed in *Tadesse*, and in the Senate floor debates on which it focuses, OSC contended "that 'intent to discriminate' 'does **not** require discriminatory animus or motivation.'" *Id*. at 940. Patrol may fail to satisfy its burden, but meanwhile it is entitled to plead good faith as a proxy for lack of discriminatory intent, in defense of Count II.

B. "The Exception" Defense

In the face of claims to the contrary, it is well settled that the exception at § 1324b(a)(2)(C) is available to employers acting under color of State authority or pursuant to State law. See *Elhajomar v. City and County of Honolulu*, 1 OCAHO 246, at 1589 (1990), *available in* 1990 WL 512094, at *2 (O.C.A.H.O.); *Anderson v. Newark Public Schools*, 8 OCAHO 1024 (1999), *available in* 1999 WL 497197 (O.C.A.H.O.). OSC argues in effect that when the over-documentation prohibition, 8 U.S.C. § 1324b(a)(6), was enacted (in 1990) four years after the 1986 enactment of liability for alienage discrimination in the workplace, the text of exceptions at 8 U.S.C. § 1324(b)(a)(2) was not modified. OSC concludes that, therefore, the scope of the exceptions is unchanged, and the exception at § 1324(b)(a)(2)(C) remains available only according to its terms, *i.e.*, to citizenship status discrimination. OSC suggests that to credit Patrol's reliance on the exception provision would lead to a parade of horribles by which the universe of authorized workers eligible for over-documentation protection would be delimited to those individuals protected under § 1324b(a)(3).

OSC is correct that the words of the exception excuse "discrimination because of citizenship status which is otherwise required in order to comply with" State law or regulation. However, OSC is mistaken in its reliance on OCAHO cases that suggest document abuse is not a subset of citizenship status discrimination. Rather than informing whether document abuse is included within the exception, OCAHO precedent addresses whether an individual must be covered against citizenship status discrimination to be protected against overdocumentation. None of the precedents cited by OSC address whether an employer may rely on State law as an exception to liability for over-documentation.

Having adjudicated § 1324b cases since the outset, and having authored decisions which § 1324b(a)(6) essentially codified, *e.g.*, *United States v. Marcel Watch Corp.*, 1 OCAHO 143 (1990), *available in* 1990 WL 512157 (O.C.A.H.O.); *Jones v. DeWitt Nursing Home*, 1 OCAHO 189 (1990), *available in* 1990 WL 511979 (O.C.A.H.O.), I am satisfied, in the absence of legislative history to the contrary, that § 1324b(a)(6) is nothing more or less than a legislated imprimatur on those cases (modified, if at all, by the 1990 amendment). That § 1324b(a)(6) is

understood to be a subset of citizenship status discrimination, *see Tadesse*, where the discrimination claim arose from events two weeks after the effective date of § 1324b(a)(6). Summary decision was denied to the employer "because Tadesse alleges a prima facie case of citizenship discrimination" and "was denied employment because the Postal service refused to honor tendered documents suitable for verifying his work eligibility." 7 OCAHO 979 at 943-944, 1997 WL 1051473 at *6.

The certitude with which OSC explains the relationship between §§ 1324b(a)(2)(C) and 1324b(a)(6) is weakened by the treatment of the two provisions *inter se*, in the regulatory implementation by the Department of Justice, at 28 C.F.R. Part 44. Paraphrasing the statute, 28 C.F.R. § 44.200 catalogues prohibited conduct at subsection (a), *i.e.*, national origin and citizenship status discrimination, intimidation or retaliation, **and "documentation abuses,"** and recites at subsection (b)(1) that "Paragraph (a) of this section shall not apply to . . . "Discrimination because of citizenship" which "Is otherwise required in order to comply with law, regulation . . ." The breadth of the reference in the exceptions text at § 44.200(b)(1) to the catalogue of otherwise actionable misconduct, catalogued at § 44.200(a), including document abuse (at § 44.200(a)(3)) is unmistakable. The Attorney General by whose authority the regulatory implementation of § 1324b is adopted having so understood, I can not agree with OSC that the issue is so clearly free from doubt as to grant its motion to strike the affirmative defense.

V. ORDER

1. Complainant's Motion to File Reply to Respondent's Answer in Opposition to Complainant's Motion to Strike Respondent's Affirmative Defenses is granted.

2. Respondent's Motion for Summary Decision is granted as to Counts I and III, and denied as to Count II.

3. Complainant's Motion to Strike Respondent's Affirmative Defenses is denied.

4. Within the next several weeks, my office will initiate arrangements with the parties for a telephonic prehearing conference to focus, *inter alia*, on the potential for an agreed disposition

and/or preparation for a confrontational evidentiary hearing. The parties should be prepared to address the matters outlined at 28 C.F.R. § 68.13(a)(2), including particularly the scheduling of discovery, if any is intended.

SO ORDERED.

Dated and entered this 6th day of January, 2000.

_____

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision, and Denying Complainant's Motion to Strike Affirmative Defenses were mailed first class this 6th day of January, 2000, addressed as follows:

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